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No. 91-715

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HERZFELD & RUBIN, P.C.,

Petitioner,

v.

HARRY ROBINSON, KAY ROBINSON, EVA MAY MCCARTHY, GEORGE SAMUEL ROBINSON, and GREER & GREER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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This reply brief, submitted in response to respondents' opposition to the Petition, addresses only matters relevant to this Court's decision to grant review. The federal nature of the immunity question raised by the Petition is of course our primary focus. However, petitioner does not thereby concede any matters not addressed. In particular, there is no concession that the allegations of "lying," fraud and misconduct which respondents lose no opportunity to repeat have the slightest factual merit.

We would note also that respondents' contentions on the merits (Br. in Opp. at 10-12), based as they are on the errors of the court below, illustrate the detrimental effects that the circuit court's decision threatens to have upon immunity jurisprudence in the federal courts. Respondents' misreading of this Court's leading decisions is thus itself a powerful factor favoring review.

I. Immunity For Trial Counsel In Federal Court Was Raised And Decided Below Exclusively in Federal Terms.

Respondents' suggestion that the issue raised on the present petition was or could have been decided under Oklahoma state law (Br. in Opp. at 1, 8-10) is profoundly mistaken. Petitioner has claimed no Oklahoma immunity, either below or before this Court. Like Petitioner's claims, the opinion below is exclusively and explicitly federal in content.

The opinion below rests entirely on the circuit court's reading and application of a series of cases decided by this Court. Only three terse Oklahoma references are scattered among the approximately twenty federal decisions discussed below on the immunity issue. These

isolated references are obviously no more than convenient examples of principles applicable under the federal doctrines which the decision, albeit erroneously, applies.[1]

II. This Case Presents The Precise Federal Question Reserved For Later Decision By This Court In *Ferri v. Ackerman.*

Respondents alternately contend that state law alone governs immunity in this case, notwithstanding the federally based decision of the circuit court. In support of this contention, respondents invoke *Ferri v. Ackerman,* 444 U.S. 193 (1979). Respondents apparently read *Ferri* as holding that no federal question of immunity is presented with respect to the activities of counsel in a federal trial if the subsequent lawsuit is grounded on state law. In fact, *Ferri* both establishes and exemplifies that immunity for participants in federal trials is a federal question, to be resolved independently of whether a given state may grant or deny immunity.

In *Ferri*, after conviction in federal court, a losing defendant sued his own appointed defense counsel (not as here the adverse attorney). The suit, brought in state court, alleged malpractice under state law. The state supreme court held that counsel's claim to immunity as a participant in a federal proceeding was a federal question, and decided the issue in favor of

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1. In fact, no string citation below begins with an Oklahoma case, and the only Oklahoma quotation longer than a sentence is relegated to a footnote. *See* Pet. at 5a n3, 7a, 8a..

immunity. This Court granted *certiorari*, and addressed and decided the immunity issue on the merits (against immunity), again of course as a federal question. 444 U.S. at 196-97. In so doing, however, the Court carefully pointed out that its resolution of the federal immunity issue in no way preempted or foreclosed the state from immunizing the relevant conduct as a matter of its own substantive law. *Id.* at 197-98.

Respondents seemingly view *Ferri's* rejection of federal preemption of state law as somehow establishing an inverse state preemption of federal law in this area. Br. in Opp. at 5-6. This notion cannot be accepted. Though only speaking directly to federal preemption of state law, *Ferri* clearly regarded neither state nor federal law as preemptive of the other.

Most tellingly, *Ferri* specifically reserved for later decision the precise question posed by the present Petition. That question, necessarily a federal matter, was defined by this Court as

> "the issue of whether defense counsel [in federal court] is immune from other kinds of [state law] tort suits ... brought by someone other than his client."

444 U.S. at 204 n22. Respondents' gloss, under which this Court would lack jurisdiction to consider either the question decided or the question reserved in *Ferri*, would literally stand the case on its head. The issue presented on the present Petition is a federal question.

III. No State Court Conduct Is At Issue On The Present Petition. If Petitioner's Evidentiary Arguments To The Federal District Judge Are Immunized, This Action Is At An End.

By repeated references to certain events before this case was removed to the federal court, respondents endeavor to create the impression that the Petition seeks to apply federal immunity to acts occurring in state proceedings. This is not the case. Petitioner claims immunity in this Court only for its alleged acts and statements in federal court. From the face of the complaint, it is clear that the grant of such immunity will end this case.

Plaintiffs allege as the proximate cause of their claimed injury a series of statements made by counsel in argument at trial, addressed to the federal district judge trying the case. These arguments persuaded the district court to change an initial ruling and exclude several exhibits that the court had initially ruled admissible. Br. in Opp. at App. 22-23, ¶¶ M,N.[2] *See also* App. 39-48,

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2. M. On November 24, 1981, ... United States District Judge James O. Ellison ruled that Exhibits 45 through 49 would be admissible...

N. On November 24, 1981, [H&R trial counsel] requested a hearing to make a record with respect to the admissibility of those documents and made the representation set forth in Paragraphs 75 through 81 herein [Br. in Opp. at App.43-App.48]. At the conclusion of that hearing and after submission of the matter to him, Judge Ellison ruled that the Exhibits ... would not be admitted at the trial.

¶¶70-80. This ruling, plaintiffs contend, crucially altered the outcome of the trial.

Petitioner claims federal immunity only for this federal court conduct. This conduct directly caused the changed district court ruling which plaintiffs allege as the root cause of the adverse jury verdict. It is thus the direct proximate producing cause of the "injury" for which they are suing. If immunity is granted to these federal court acts and statements, the entire action against H&R must fail. The federal immunity ruling sought on the present petition is dispositive of the entire case.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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